

1 Supreme Court of the United States; or (2) resulted in a decision that was based on an
2 unreasonable determination of the facts in light of the evidence presented in the State court
3 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
4 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),
5 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
6 *Cockrell*, 537 U.S. 322, 340 (2003).

7 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
8 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
9 reached by [the Supreme] Court on a question of law or if the state court decides a case
10 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
11 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application
12 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
13 identifies the governing legal principle from the Supreme Court's decisions but
14 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
15 federal court on habeas review may not issue the writ "simply because that court concludes
16 in its independent judgment that the relevant state-court decision applied clearly
17 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must
18 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

19 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual
20 determination will not be overturned on factual grounds unless objectively unreasonable in
21 light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322 at
22 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

23 When there is no reasoned opinion from the highest state court to consider the
24 petitioner's claims, the court looks to the last reasoned opinion. See *Ylst v. Nunnemaker*,
25 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th
26 Cir.2000).

27 DISCUSSION

28 Petitioner asserts that the bargain he accepted included an agreement that he would

1 serve no more than ten years, or twelve at most, before being paroled. He contends that
2 the State has failed to perform its side of the plea agreement, which, if true, would be a due
3 process violation.

4 **I. Statute of Limitations**

5 Respondent contends that petitioner's plea bargain claim is barred by the statute of
6 limitations. Petitions filed by prisoners challenging non-capital state convictions or
7 sentences must be filed within one year of the latest of the date on which: (A) the judgment
8 became final after the conclusion of direct review or the time passed for seeking direct
9 review; (B) an impediment to filing an application created by unconstitutional state action
10 was removed, if such action prevented petitioner from filing; (C) the constitutional right
11 asserted was recognized by the Supreme Court, if the right was newly recognized by the
12 Supreme Court and made retroactive to cases on collateral review; or (D) the factual
13 predicate of the claim could have been discovered through the exercise of due diligence.
14 28 U.S.C. § 2244(d)(1).

15 Breach of a plea bargain can be a due process violation and a basis for habeas
16 relief. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The triggering date for the
17 statute of limitations for a claim that a plea bargain was breached is when "the factual
18 predicate of the claim could have been discovered through the exercise of due diligence."
19 See 28 U.S.C. § 2244(d)(1)(D); *Murphy v. Espinoza*, 401 F.Supp.2d 1048, 1052 (C.D. Cal.
20 2005) (for purposes of § 2244(d)(1)(D), factual predicate for a breached plea agreement
21 claim is when prisoner was, or with the exercise of reasonable diligence should have been,
22 aware that the state committed the alleged breach); *Martinez v. Kane*, No. C 05-3429 WHA
23 (PR), 2007 WL 2729799, at *2 (N.D. Cal. Sept. 19, 2007) ("The triggering date for the
24 statute of limitations [for breach of plea bargain claim] was when 'the factual predicate of
25 the claim could have been discovered through the exercise of due diligence'" pursuant to §
26 2244(d)(1)(D)); *Daniels v. Kane*, No. C 04-5123 MHP (PR), 2006 WL 1305209, at *1 (N.D.
27 Cal. May 10, 2006) (statute of limitations begins to run on "the date a petitioner knew or
28 should have known that a breach occurred.").

1 Petitioner was sentenced on November 30, 1989. Ex. A at 6 (Abstract of Judgment).
2 Thus, no later than the beginning of December of 2001 he knew he was not going to be
3 paroled in “ten, or at most twelve,” years. His federal petition therefore had to be filed no
4 later than December of 2002. See 28 U.S.C. § 2244(d)(1)(D) (one-year limitations period
5 runs from date the factual predicate of the claim could have been discovered through the
6 exercise of due diligence). This petition was not filed until March of 2007, so unless the
7 running of the limitations period was tolled, it is untimely. Petitioner’s first state action
8 raising the plea bargain claim – a petition for a writ of error coram nobis – was not filed until
9 September 9, 2004, so statutory tolling does not apply. Ex. A at 15; see 28 U.S.C. §
10 2244(d)(2) (limitations period is tolled while a properly filed application for state post-
11 conviction or other collateral review is pending). Petitioner does not allege that equitable
12 tolling applies, and no basis for it appears in the record. See *Holland v. Florida*, 130 S. Ct.
13 2549, 2560 (2010) (AEDPA’s statute of limitations is subject to equitable tolling in
14 appropriate cases). The petition thus is barred by the statute of limitations.

15 **II. Merits**

16 Alternatively, petitioner’s claims have no merit. His claim depends, of course, on
17 whether the plea agreement included a promise by the state that he would serve no more
18 than ten or twelve years; if there were no such promise, there could have been no breach.

19 When petitioner presented this claim in the court of appeal, the court remanded to
20 the superior court to hold an evidentiary hearing. Ex. C (opinion of court of appeal on direct
21 appeal from denial of writ) at 2-3. The transcript of the plea proceedings could not be
22 found. *Id.* at 3 n.2. Petitioner does not dispute the court of appeal’s summary of the
23 testimony at the evidentiary hearing.

24 Petitioner testified that his defense attorney told him, in the presence of the
25 prosecutor, that he would serve ten or twelve years, and that the prosecutor told him to
26 keep his “nose clean” and he would be out in ten years. *Id.* at 3. Petitioner’s sister testified
27 that she was present in the courtroom when the plea was being discussed and heard that
28 petitioner would be out in ten or twelve years. *Id.* at 4. Defense counsel testified that he

1 told petitioner he would be out in ten or twelve years, but did not testify that he had been
2 promised that by the prosecution. *Id.* The prosecutor specifically denied telling petitioner
3 or his counsel how much time petitioner would serve. *Id.* The written plea form carries a
4 statement, initialed by petitioner, that no promises other than those included in the
5 document had been made, and the document does not say that petitioner would be paroled
6 in ten or twelve years. *Id.* at 4-5; Ex. F, attached Decl. Lieberman Ex. E. The superior
7 court found that no such promise had been made, and denied the writ. Ex. C at 4-5. The
8 court of appeal concluded that the superior court's credibility determination favoring the
9 prosecutor was supported by the record and affirmed the denial of the writ. *Id.* at 6.

10 The evidence was conflicting, the superior court found that the prosecutor was more
11 credible, and the prosecutor's version was supported by the written plea agreement. In
12 these circumstances, it was not an unreasonable determination of the facts in light of the
13 evidence for the state courts to find that no promise of release in ten or twelve years had
14 been made to petitioner. This claim is rejected on this alternative ground. See 28 U.S.C. §
15 2254(d)(2) (to grant habeas relief grounded on a factual error by state court, federal court
16 must conclude that the state decision was an "unreasonable determination of the facts in
17 light of the evidence presented in the State court proceeding.").

18 **III. Appealability**

19 The federal rules governing habeas cases brought by state prisoners require a
20 district court that denies a habeas petition to grant or deny a certificate of appealability in
21 the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254
22 (effective December 1, 2009).

23 A petitioner may not appeal a final order in a federal habeas corpus proceeding
24 without first obtaining a certificate of appealability (formerly known as a certificate of
25 probable cause to appeal). See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall
26 grant a certificate of appealability "only if the applicant has made a substantial showing of
27 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate
28 which issues satisfy this standard. See *id.* § 2253(c)(3).

1 This was not a close case. For the reasons set out above, jurists of reason would
2 not find the result debatable or wrong. A certificate of appealability will be denied.

Petitioner is advised that if he wishes to attempt to appeal, he must file a notice of appeal, even though the court has denied a COA. He may then ask the court of appeals to issue a COA under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a), Rules Governing § 2254 Cases.

CONCLUSION

8 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**.
9 A Certificate of Appealability also is **DENIED**. See Rule 11(a) of the Rules Governing
10 Section 2254 Cases.

11 || The clerk shall close the file.

IT IS SO ORDERED.

13 || Dated: September 27, 2010.



PHYLLIS J. HAMILTON
United States District Judge

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